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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARCOS BELTRAN, Defendant and Appellant.	G040149 (Super. Ct. No. 06CF0839) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed as modified.

Dacia A. Burz, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Eric A. Swenson, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

After a court trial, defendant Marcos Beltran was convicted of forcible spousal rape (Pen. Code, § 262, subd. (a)(1); count 1; all further statutory references are to the Penal Code); domestic battery with bodily injury (§ 273.5, subd. (a); count 2); making terrorist threats (§ 422; count 3); aggravated assault (§ 245, subd. (a)(1); count 4); and misdemeanor child abuse (§ 273a, subd. (b); count 5). The court also found defendant had two prior felony strikes (§§ 667, subds. (d), (e)(2)(A), 1170.12, subd. (b)) and a prior serious felony conviction (§ 667, subd. (a)(1)). After refusing to strike one of defendant's prior strikes, the court sentenced him to 25 years to life on count 1 with concurrent terms of 25 years to life on counts 2, 3, and 4, 6 months in county jail on count 5, and a 5-year consecutive term for the prior serious felony, for a total term of 30 years to life.

Defendant makes three arguments on appeal: there was no substantial evidence to show he had the present ability to use a deadly weapon, requiring the aggravated assault count to be reversed; the sentences for counts 2 through 4 violate the proscriptions of section 654; and the court failed to properly exercise its discretion when it refused to dismiss a prior strike. The Attorney General agrees the sentence on count 2 should be stayed but contests all other arguments. We agree with defendant's claim as to sentencing and modify the judgment to stay the sentences on counts 2, 3, and 4. In all other respects the judgment is affirmed.

FACTS

Defendant lived with his wife, wife's five-year-old daughter (child 1), and their one-year-old daughter in a bedroom in a shared house. One day defendant wanted to have sex with wife, who refused. Defendant told her if she did not he would hurt child 1 or wife's grandmother. He then hit wife in the face with his fist, strangled her for about 15 seconds, and then pushed her down on to the bed. Wife thought defendant was going

to kill her. As she tried to get up, defendant pushed her down with his knee on her stomach. Child 1 told defendant to stop and tried to convince wife to do as defendant asked so he would not hurt her; defendant pushed child 1 on to the floor.

As wife started to cry "desperately," defendant told her to "shut up." Wife tried to pull herself together and told child 1 not to worry because she would do what defendant wanted. As defendant let wife get off the bed she was still crying. He then held wife's eyebrow shaver over her head and said if she did not shut up "he was going to cut off [her] tongue or he was going to go to the kitchen and grab a kitchen knife." Later he threatened to slit child 1's throat while wife watched and said if wife tried to leave him or call the police he would take child 2 and wife would never again see either of them.

Defendant finally let wife take a shower, after which he again demanded she have sex with him, stating it was her duty as a wife. Although she did not want to she finally agreed and they had intercourse. As wife testified at trial this all occurred over the period of about one hour. This contradicted what she told investigating officers, which was that the incident lasted about 45 minutes and then a hour passed before she took the shower.

After the police were called detective Andy Alvarez examined wife and saw a bump on her forehead and red marks around her neck. During Alvarez's interview of wife she cried uncontrollably at times, telling him she was fearful for her safety and that of child 1 because she was not defendant's daughter.

When Alvarez interviewed husband at the police station, he said he and wife had argued because she refused to have sex with him despite the fact he told her she had a biblical duty to do so. He admitted that even when they did have sex wife did not want to. He denied causing any of her injuries but claimed that by the time they did have intercourse their argument had been resolved.

DISCUSSION

1. Sufficiency of the Evidence

Defendant claims there was insufficient evidence that he had the present ability to use the eyebrow shaver as a deadly weapon, thereby nullifying the conviction for aggravated assault. We disagree.

Where there is a claim of insufficient evidence, "we 'examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129, disapproved on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) It is not within our province to reweigh the evidence or redetermine issues of credibility. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Further, "[u]nless it is clearly shown that 'on no hypothesis whatever is there sufficient substantial evidence to support the verdict' the conviction will not be reversed. [Citation.]" (*People v. Quintero* (2006) 135 Cal.App.4th 1152, 1162.) "'[I]f the circumstances reasonably justify the . . . findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.' [Citation.]" (*People v. Guerra, supra,* 37 Cal.4th at p. 1129.)

"An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) "Ordinarily, '[a]n assault occurs whenever "'[t]he next movement would, at least to all appearance, complete the battery.'" [Citation.]' [Citations.] But there can also be an assault when the battery is only threatened. [Citation.] '"Where a party puts in a condition which must be at once

performed, and which condition he has no right to impose, and his intent is immediately to enforce performance by violence, and he places himself in a position to do so, and proceeds as far as it is then necessary for him to go in order to carry out his intention, then it is as much an assault as if he actually struck, or shot, at the other party, and missed him.'" [Citations.]" (*People v. Page* (2004) 123 Cal.App.4th 1466, 1473.) "'Once a defendant has attained the means and location to strike immediately he has the "present ability to injure."' [Citation.]" (*People v. Licas* (2007) 41 Cal.4th 362, 366-367.) Section 245, subdivision (a)(1), punishes "an assault upon the person of another with a deadly weapon or instrument . . . likely to produce great bodily injury . . . ."

Relying substantially on dictionary definitions of a razor, defendant argues that the eyebrow shaver, which he describes as "a safety razor," "is not readily capable of use as a deadly weapon." We are not persuaded. We examined the instrument put into evidence as defendant suggested. It is plastic, about five and a half inches long and about half an inch wide, relatively flat. It has a blade on one side exposed to about the same extent as a blade in a disposable shaver. The blade is somewhat dull and serrated and it does have an edge to it. The other end has a tapered, rounded tip. The blade could have cut wife and defendant could have used the other end to stab her, giving him the present ability to harm wife.

In *People v. Page, supra,* 123 Cal.App.4th 1466, the court held that, under the facts of the case, a sharp pencil "was a deadly weapon as a matter of law." (*Id.* at p. 1473.) The shaver here is similar enough to a pencil to fall within this case.

The conflict in evidence as to whether defendant held the shaver by his side, as Alvarez testified wife told him, or over his head, as she testified, does not affect our analysis. Moreover, even if defendant did not threaten to cut wife's throat, as the prosecutor argued, as opposed to threatening to cut off her tongue, that does not mitigate against his ability to cut her or stab her somewhere, which is sufficient to satisfy the

elements of aggravated assault. Therefore, we cannot say as a matter of law that it is not inherently dangerous or that on no hypothesis whatever it could not be considered an inherently dangerous weapon.

2. Multiple Punishments

Defendant contends that the concurrent sentences for counts 2, 3, and 4, for domestic battery with bodily injury, making terrorist threats, and aggravated assault, respectively, were multiple punishments for the same offense and thus barred by section 654. The Attorney General concedes the argument as to domestic battery but argues counts 3 and 4 were separate offenses and properly punished separately. We agree the sentences for counts 2, 3, and 4 punished the same conduct underlying the spousal rape conviction and they must be stayed.

Section 654, subdivision (a) provides, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." "'If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' [Citation.] If, on the other hand, 'the [defendant] entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citations.]" (*People v. Martin* (2005) 133 Cal.App.4th 776, 781.)

In arguing about whether the convictions for making terrorist threats and aggravated assault were incident to the spousal rape, the parties disagree about the sequence of events. Defendant contends that all the threats, including the assault with the

eyebrow shaver and the threats to obtain the kitchen knife and slit child 1's throat, occurred before wife's will was overborne and she agreed to have sex with defendant. Thus, he asserts, all the threats were "part of [defendant's] single minded objective to force . . . wife to have sex . . . ."

The Attorney General maintains wife's will was overborne after defendant hit and strangled her, because she told child 1 she would do whatever defendant told her, i.e., have sex with him, but before he threatened her with the shaver and threatened to slit her child 1's throat.

The record is unclear about whether all the threats were made before defendant knew wife would have sex with him or whether some occurred after her will was overborne. We review the trial court's decision in the light most favorable to the prosecution, presuming the existence of every fact the court could reasonably deduce from the evidence. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.) Based on that standard of review we must assume some of the threats occurred after wife's capitulation. The real question, then, is, even based on this sequence of events, do these facts constitute substantial evidence of a separate intent and objective on defendant's part.

Whether defendant harbored a "single intent" is a factual determination made by the trial court. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) On appeal, that decision must be sustained if supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730.) Here, the trial court made no determination on this question. In fact, the issue of multiple punishments under section 654 was not raised in the trial court. Nevertheless we may consider it. (*People v. Hester* (2000) 22 Cal.4th 290, 295 [applicability of section 654 may be raised on appeal even if no objection in trial court].)

In reviewing the record we find no substantial evidence to support an implied finding of divisibility. The Attorney General argues that the threats occurring after wife had agreed to have sex with defendant "were designed to establish [defendant's] dominance within the relationship, . . . to ensure that [wife] would remain under his control as long as they were together[, and] . . . to teach [child 1] the same lesson." But nothing in the record supports this theory. Rather, in closing argument the prosecutor stated that "defendant raped his wife against her will and accomplished this by fear by repeatedly subjecting her to strangulation, a weapon, threat to get a knife and slit her throat open, threatened to slit her daughter's throat open and make her watch her child die." Thus, even according to the prosecution's theory, defendant's sole objective appears to have been to intimidate wife to have sex. No other objective has been shown.

"The requirements of section 654 are mandatory." (*People v. Price* (1986) 184 Cal.App.3d 1405, 1412.) Although staying sentences for counts 2, 3, and 4 will have no effect on the amount of time defendant will serve, "[s]ection 654 does not allow any multiple punishment, including . . . concurrent . . . sentences. [Citation.]" (*People v. Deloza* (1998) 18 Cal.4th 585, 592.) Accordingly, the sentences on counts 2, 3, and 4 must be modified to reflect stayed terms.

3. Trial Court's Refusal to Dismiss a Strike

Defendant's prior strikes are based on two robberies, one involving a weapon and the other not. He also had multiple parole violations and admitted he had used drugs for almost 20 years.

Defendant claims the court abused its discretion by failing to strike one of his two strikes because it incorrectly assumed both strikes were armed robberies. He argues the court refused to consider evidence presented about the first "strongarm" robbery and that if it had, it would have more favorably considered the mitigating factors,

that the prior strikes were remote (10 years before the current events) and they were caused by his long-time drug use and psychological problems. We are not convinced.

In denying the motion under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*) the court found "no rational basis [to] exercise its discretion and strike priors . . . ." It relied on the probation report that set out the "facts and circumstances of the prior strikes . . . . The defendant was a substantial participant . . . . He used a firearm, two firearms were eventually recovered in his car that had been carjacked, [and] his performance on parole after that was poor." The court further noted that defendant admitted he had been using narcotics for more than half his life, since age 12, and that "affected his relationships with family members." Finally, the court stated that the testimony of the events underlying the crimes was "chilling."

Section 1385, subdivision (a) authorizes a trial court to strike prior felony conviction allegations "in furtherance of justice." (*Romero, supra,* 13 Cal.4th at pp. 529-530.) In deciding a motion to strike, the trial court "must consider whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

We review a trial court's failure to strike a prior conviction for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 375.) In doing so "we are guided by two fundamental precepts. First, '"[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the

legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.'" [Citations.] Second, a '"decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'"' [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id*. at pp. 376-377.)

Defendant's claim the court refused to consider the events of the strongarm robbery is based on its decision not to consider the prosecution's sentencing brief, which described the two robberies, because the brief also included information "not appropriately before the court by way of evidence." Instead, it stated the probation report was adequate for purposes of sentencing. But the probation report described only the armed robbery.

Defendant also relies on the statement by the trial judge in sentencing that the probation report contained the circumstances of the "prior *strikes*." But defendant's lawyer pointed out at the sentencing hearing that the strikes arose from two separate incidents. And the abstract of judgment from the prior convictions showed one robbery as second degree and that the firearm enhancement applied only to one of the two robbery counts.

Moreover, even with only one robbery involving a firearm there was more than sufficient evidence, based on the details of the crimes, the events of the two prior convictions, defendant's long-term drug use, and his parole violations, to show this was not an extraordinary case taking defendant out of the Three Strikes scheme. Thus the court's refusal to strike a prior conviction was neither irrational nor arbitrary and did not constitute an abuse of discretion.

DISPOSITION

The judgment is modified to stay the 25-years-to-life terms on counts 2, 3, and 4, the stay to become permanent upon appellant's completion of the sentence for count 1. Except as modified the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and forward a certified copy of it to the Department of Corrections and Rehabilitation.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.